No. 19877

In the

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, *et al.*,

Appellant,

vs.

THE BUSH MANUFACTURING COMPANY, *et al.*,

Appellee.

APPELLEE'S PETITION FOR REHEARING.

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TABLE OF AUTHORITIES CITED

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APPELLEE'S PETITION FOR REHEARING.

Appellee respectfully petitions the Court for a rehearing of this appeal upon the following grounds:

I.

The Quoted Portion of Appellee's Brief in the Opinion on Page 6 Thereof Is Taken Out of Context.

The point made by appellee was that the burden of proving that a standard of care was not met is upon the plaintiff, not on defendant. Plaintiff failed in its proof.

To be correct the quoted portion on page 6 of the opinion should end with the words "if the plaintiff proves by a preponderance of the evidence that the custom does not meet the standard."

II.

The Trial Court Did Not Rely Solely on the Finding of "Custom and Usage" but Took Into Consideration the Actual Methods of Manufacture, Control and Testing by Appellee.

The evidence recited on pages 8 and 9 of Appellee's brief shows clearly the care with which the units were designed, manufactured and tested which in and of itself could be considered by the trial court as overcoming the inference of negligence, and, which is sufficient under Arizona law to rebut such an inference.

III.

The Intent and Purpose of the Finding of Fact "That Plaintiff Knew That Said Coils Had Leaked at Three Specific Times and at Least One or Two Months Before December 3rd and 4th, 1955," Was to Show Knowledge on the Part of Plaintiff.

It was a finding that plaintiff had:

(1) assumed the risk of injury from any further leaks in the coils, having been fully advised of the leakage problem, and

(2) was contributorily negligent in not demanding a replacement of the coils when the express warranty upon which it was held liable in the first action was not known to Appellee. Further, by the execution of its express warranty which went far beyond the warranty of Appellee, and far beyond the Sales Act of Arizona, it assumed the risk of injury resulting from defective operation.

IV.

There Is a Failure of Proximate Cause If Recovery by Plaintiff Herein Is Really Based on Equitable Indemnity for Negligence.

No injury or damage to the meat in the storage room would have occurred if the door between the refrigeration room, in which were located the coils, and the storage room had been in good working order and repair so that it would not have opened and allowed the gas to escape into the storage area. The original purpose of separation of rooms was thus frustrated.

V.

This Court Has Applied Its Own Judgment for That of the Trial Court.

The Court has done violence to Arizona law, as set forth on pages 13 through 17 of Appellee's brief, and has applied "federal law" rather than state law to the actions of the trial court. The "clearly erroneous" theory as set forth on page 7 of the opinion was born of federal law as set forth in *United States v. United States Gypsum Company,* 333 U.S. 364, at 395 (1948), a Sherman-Anti-Trust case, *United States v. Muns,* 352 F. 2d 196 (9th Cir. 1965), a case involving a federal statute, and other cases involving federal statutes, and does not apply to product liability cases which are bottomed on state law; in this instance, Arizona. "Federal law" should not be used in this case.

VI.

The Findings of No Negligence in Manufacture and Design Are Not "Clearly Erroneous."

To so find the Court must completely disregard:

(a) The trial court's consideration of *all* the evidence

(b) Contributory negligence

(c) Assumption of risk

(d) Arizona law

(e) The extreme diffculty in overcoming the inference of negligence in view of the lapse of time between manufacture and trial (approximately 9 years)

(f) The inference that it is applying the "strict liability" test of product liability and is doing only lip service to the doctrine and theory of negligence.

Appellee respectfully requests that this Honorable Court grant a rehearing of this appeal and that the judgment thereafter be affirmed.

Respectfully submitted,

TREMAINE & SHENK,
By JOHN W. SHENK,
Attorneys for Appellee.

Dated May 19, 1966.

Certificate.

I hereby certify that in my judgment the petition for rehearing is well founded and further certify that it is not interposed for delay.

JOHN W. SHENK,
Attorney for Appellee